Office-Supreme Court, U.S.
FILED
APR 27 19
ALEXANDER L. STEVAS,

No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,

Petitioner,

v.

JOSEPH H. MUNSON COMPANY, Inc.,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF BOX OFFICE, INC., AS AMICUS CURIAE

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES ii
INTEREST OF THE AMICUS CURIAE 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT

I. Certiorari Should Be Dismissed As Improvidently Granted If Either The Constitutional Or The Prudential Branch Of The Standing Test Is Not Met 5

II. In View Of Its Construction Of Section 103D, The Maryland Court Of Appeals Was Correct In Holding That The Section Is Overbroad, And That It Violates The Expressive Rights Of Advocacy And Public Information Organizations; Alternative Regulations Far Less Intrusive Of First Amendment Rights Would Better Accomplish State Objectives 10

III. The Standard For Granting Or Denying Waivers From the 25% Limitation Contravenes The First Amendment 18

CONCLUSION 23

TABLE OF AUTHORITIES CITED

Page

Cases:

Allied Stores v. Bowers, 358 U.S. 522 (1959) 9
Aptheker v. Secretary of State, 370 U.S. 500 (1964) 14
Bateman v. Arizona, 429 U.S. 1302, *cert. denied*, 429 U.S. 864 (1976) 6
Benz v. New York State Thruway Authority, 369 U.S. 147 (1962) 10
Brandenburg v. Ohio, 395 U.S. 444 (1969) 18
Brown v. Glines, 444 U.S. 348 (1980) 18
Buckley v. Valeo, 424 U.S. 1 (1976) 16
Cantwell v. Connecticut, 312 U.S. 296 (1940) 19, 20, 22
Cheaney v. Indiana, 410 U.S. 991 (1973) 10
Clark v. State, 284 Md. 260, 396 A.2d 243, *cert. denied sub nom* 9
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 7
Cree v. Goldsteim, 385 U.S. 816 (1966) 9
Delaware v. Prouse, 440 U.S. 648 (1979) 9
Doremus v. Board of Education, 342 U.S. 429 (1952) 6, 7, 10
Dulaney v. Municipal Court (People), 11 Cal. 3d 77, 520 P.2d 1, 112 Cal. Rptr. 777 (1974) 18
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 12
Flast v. Cohen, 392 U.S. 83, 132 n.22 (1968) 7
Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) 7
Hague v. CIO, 307 U.S. 496 (1939) 18
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 19, 22
International Soc'y. for Krishna Consciousness v. Eaves, 601 F.2d 809, 823 n.10 (5th Cir. 1979) 19
Kinsley v. Governor of Md., 289 Md. 620, 426 A.2d 908 (1981) 9

Laird v. Tatum, 408 U.S. 1 (1972) 6
Larson v. Valente, 102 S.Ct. 1673 (1982) 14
Lovell v. City of Griffin, 303 U.S. 444 (1938) 19, 22
Martin v. City of Struthers, 319 U.S. 141 (1943) 18
M'Culloch v. Maryland, 17 U.S. (4 wheat.) 316 (1819) 21
Murray v. Comptroller of the Treasury, 241 Md. 383, 216 A.2d 897, *cert. denied sub nom.* 9
NAACP v. Button, 371 U.S. 415 (1963) 12, 20
National Found. v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) 13, 14, 22
Niemotko v. Maryland, 340 U.S. 263 (1951) 19
Princeton University v. Schmid, 455 U.S. 100 (1982) 7, 10
Reyes v. Prince George's County, 281 Md. 279, 380 A.2d 12 (1977) 8
Schneider v. State, 308 U.S. 147 (1939) 20
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 18
South Dakota v. Neville, 103 S.Ct. 916 (1983) 9
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 19
Stutzman v. Maryland, 444 U.S. 858 (1979) 9
Thornhill v. Alabama, 310 U.S. 88 (1940) 12
Tileston v. Ullman, 318 U.S. 44 (1943) 8
Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900) 6
United States v. Raines, 362 U.S. 17, 23 n.3 (1960) 7
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 5
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 5, 8

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 3, 4, 10, 11, 12, 13, 14, 15, 17
Warth v. Seldin, 422 U.S. 490 (1975) 6
Wolf v. Weinstein, 372 U.S. 633 (1963) 10
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 9

Statutes:

Md. Ann. Code Art. 41, § 103D (1982) ..... passim

Md. Admin. Code Tit. 01
§ 02.04.05(B) (1) 15, 20
§ 02.04.05(B)(2)(a) 15
§ 02.04.05(B)(2)(b) 15
§ 02.04.05(B)(3) 20
United States Code
§ 1147 21
§ 1151 2
§ 1153 2
§ 1157 2
39 C.F.R. § 232.1 2

Other Authorities:

Boyle & Jacobs, Fund Raising Costs, Philanthropy Monthly, Apr. 1979 17
C. Brown, Introduction to Maryland Civil Litigation § 1.51 ..... 8, 9
Supreme Court and Supreme Law (E. Cahn ed. 1954) 7

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JOSEPH H. MUNSON COMPANY, INC.,

Respondent.

This brief amicus curiae of Box Office, Inc., submitted in support of the respondent, is filed with the consent of the parties as provided by the Rules of this Court. Letters confirming the consent of the parties have been or will be filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

Box Office, Inc., is a Missouri corporation whose primary function is the provision of consulting, development, and fundraising services for labor unions and charitable and fraternal organizations. Since its organization in 1978, it has engaged in such representation in Missouri, Iowa, Indiana, Nebraska, and Minnesota.

The public relations and fundraising campaigns Box Office coordinates include the dissemination of information by which Box Office seeks to acquaint the general public with the organizations' history and objectives. Among its clients are chapters of the Paralyzed Veterans of America,[1] the Federation of Postal Police Officers,[2] several other police labor organizations, the American Legion, the Junior Chambers of Commerce, and the Kiwanis and Optimists Clubs.

As a consequence of its activities, Box Office deals on a continuing basis with state and municipal laws, exemplified by the Maryland statute at issue here, regulating the public solicitation of funds. In particular, Box Office's activities have on occasion have been affected by regulations of the proportion of money collected that may be used for expenses of fundraising, and it has experienced the significant limitations that such laws have on the ability of organizations effectively to promote their purposes and to advocate their views. Amicus therefore has a direct interest in the outcome of litigation that may implicate the constitutional validity of such laws.

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[1] The Paralyzed Veterans of America is a corporation created by act of Congress, 36 U.S.C. § 1151 (1976), whose membership is generally limited to citizens formerly on active duty in the armed services who have suffered spinal injury or disease. *Id.* § 1157. It is charged with the purpose of public advocacy and information dissemination in relevant areas of medical research and rehabilitation. *Id.* § 1153.

[2] The Federation of Postal Police Officers is the certified bargaining union for members of the United States Postal Service Security Force, which is a police agency established under authority of the Postal Service Act. *See* 39 C.F.R. §232.1 (1982).

SUMMARY OF THE ARGUMENT

The Secretary of State of Maryland (the Secretary) seeks in this case to obtain relief from the unanimous decision of the Maryland Court of Appeals declaring a provision of the Maryland charitable solicitation laws invalid under the first amendment. The provision at issue, Md. Ann. Code art. 41, § 103D (1982), prohibits the expenditure of more than twenty-five percent of funds raised for charitable purposes for the costs of fund raising.

The Secretary asserts that the respondent, Joseph H. Munson Co., Inc. (Munson), did not have standing under federal standing principles to bring his constitutional challenge, and that the Maryland courts should not, therefore, have considered the suit. Amicus focuses on the consequences that would follow from a determination that federal standing requirements were not satisfied. First, this Court would, of course, be precluded from deciding the case on the merits. But the further action advocated by the Secretary—reversing the judgment of the Maryland Court of Appeals with instructions to remand for dismissal—pays insufficient solicitude to the power of state courts to entertain actions, even those based on federal constitutional questions, which could not be presented in the federal courts. The disposition proposed by amicus—dismissing the writ of certiorari as improvidently granted—is advised by the Court's precedents and, not incidentally, gives proper recognition and deference to Maryland's policy to afford its citizens broad rights to judicial determination of constitutional questions.

On the merits, the Secretary attempts to distinguish section 103D from the fundraising regulation held unconstitutionally overbroad in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), on the ground that, unlike the Schaumburg ordinance, the

Maryland statute vests wide-ranging discretion in state officials to waive the percentage limitation in cases where the first amendment might be thought to require such a waiver. The Maryland Court of Appeals, however, authoritatively construed the exemption provisions as extremely narrow. It thus correctly held the precentage limitation itself unconstitutionally overbroad. When analyzed in light of the court of appeals' construction, it is clear that section 103D deprives advocacy and public information non-profit groups of expressive rights just as did the Schaumburg ordinance and is for the same reasons invalid. Other remedies, far short of the crude and indiscriminate approach of section 103D, and in fact already suggested by the Court in *Schaumburg*, would not only better protect the public interest in preventing fraud, but would allow the widest possible latitude to protected expression and would permit charitable organizations to select their own internal organization and approach to fundraising.

Finally, to the extent greater administrative latitude is provided by section 103D, allowing the Secretary to excuse compliance with the twenty-five percent limitation on an ad hoc basis, the section invites discriminatory application, and therefore collides with long-standing principles against the application of discretionary standards to activity protected by the first amendment.

ARGUMENT

I.

Certiorari Should Be Dismissed As Improvidently Granted If Either The Constitutional Or The Prudential Branch Of The Standing Test Is Not Met.

The Secretary, although she had earlier opined that the question was "unresolved," Reply Brief of Petitioner [on petition for writ] at 5 n.5, now asserts that "[i]t . . . is clear that state courts, just like federal courts, are bound to follow . . . [federal] standing rules when deciding federal questions." Brief of Petitioner at 20. In fact, it is the contrary proposition that is "clear." The result here is that if, as the Secretary strenuously contends, the norms of federal standing are not satisfied, the merits of the case are not subject to adjudication by this Court. In this event the practices of the Court counsel that certiorari should be dismissed as improvidently granted. Such a disposition would be particularly appropriate in this case because Maryland's internal law of standing does not so much as require the existence of an actual controversy.

The question of standing must of course be approached at the outset since it "implicate[s]" this Court's "jurisdiction to decide the case." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260 (1977). It is by now familiar that "[t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations," *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), the former restricting federal courts "to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate," *id.* at 473, and the latter, among other things, generally requiring a party to " 'assert

his own legal rights and interests.' " *Id.* at 474 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In the present case the Secretary, while perhaps implicitly inviting the Court to take up the matter sua sponte, is said not to "make an issue of 'injury in fact standing.' " Brief of Petitioner at 18-19 n.12.[3] The Secretary, does, however, present a plenary challenge to Munson's standing to raise the first amendment rights of its organizational clients. *Id.* at 17-26.

It has long been established that, as fundamental concerns of federalism require, the state courts—unlike their federal counterparts, to which article III is addressed —are under no compulsion to adhere to purely federal doctrines of standing.[4] This Court has "not undertake[n] to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded as advisory." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).[5] *See also Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 410 (1900). When, however, the case reaches this

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[3]The Secretary may be intimating that the fact that one of Munson's clients was "reluctant" to enter into a contract with Munson as a result of Md. Ann. Code art. 41, § 103D (1982), Petition for Writ of Certiorari and Appendix at 39a, constitutes a mere "subjective 'chill' " insufficient to create article III standing. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

[4]The cases cited by the Secretary in which the Court discussed third party standing issues on review of state court decisions, *see* Brief of Petitioner at 20, relate to the appropriateness of the consideration *by this Court* of the constitutional issues raised. They do not purport to dictate standing rules to the states.

[5]The essence of *Doremus*, that "[t]he courts of a state are free to follow their own jurisprudence as to who may raise a federal constitutional question," *Bateman v. Arizona*, 429 U.S. 1302, 1305 (Rehnquist, Circuit Justice) (order denying alternative application for

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Court, the inquiry shifts to a different plane, and standing becomes "a separate issue to which [the Court] must [its] independent judgment" as a matter of federal law. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 282 (1961); *accord, e.g., United States v. Raines*, 362 U.S. 17, 23 n.3 (1960).[6] The Court has never departed from the *Doremus* approach, which, indeed, was unanimously reaffirmed as recently as last Term. *See Princeton University v. Schmid*, 455 U.S. 100, 102 n.* (1982) (per curiam).

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bail or stay), *cert. denied*, 429 U.S. 864 (1976), is particularly salient where, as in this case, the state court's decision affects a program wholly within the state's own domain rather than purporting to bind a federal official or otherwise to implicate an overriding interest in effective federal supremacy. *See Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., joined by Burger, C.J., & Stewart & Stevens, JJ., concurring in the judgment) (interference with foreign policy).

[6]The Secretary's reference to the suggestion of Professor Freund that state courts be "bound by this Court's federal question standing decisions," Reply Brief of Petitioner [on petition for writ] at 5 n.5; *see also* Brief of Petitioner at 20 n.13, is unavailing. While it is true that, during the course of a spontaneous discussion, Professor Freund expressed the view that where federal standing did not appear "the petition should stand dismissed in the state court and the decree vacated so that it would not be a precedent even in the state court," he at once made clear that his opinion was based on "disagreement with the Doremus case," which, he recognized, "lets the state judgment stand and merely declines review." *Supreme Court and Supreme Law* 35 (E. Cahn ed. 1954) (remarks of Paul A. Freund).

Justice Harlan, too, noted that the Freund proposal "would demand partial reconsideration" of *Doremus*, along with such other decisions as *Cramp* and *Raines*. *Flast v. Cohen*, 392 U.S. 83, 132 n.22 (1968) (Harlan, J., dissenting). This, of course, has not occurred. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 102 n.* (1982) (per curiam) (citing *Cramp* and *Raines*).

The fact that the Secretary's formal claim relates to the prudential branch of standing, the "third party standing rules," Brief of Petitioner at 20, and not to the irreducible minima of article III, *but see supra* p. 6 & note 3, does not affect the analysis. For both "[t]he constitutional *and* [the] prudential considerations . . . respond to concerns that are peculiarly federal in nature." *Arlington Heights*, 429 U.S. at 262 n.8 (emphasis added). Thus in *Tileston v. Ullman*, 318 U.S. 44 (1943), the Court—without finding it necessary to "consider whether the record shows the existence of a genuine case or controversy"—dismissed an appeal from a state court because the appellant sought to raise only the rights of third parties. *Id.* at 46.

Maryland's rules of standing differ significantly both in concept and operation from those applicable in the federal courts.[7] It is, in any event, irrelevant whether the Maryland

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[7] The Secretary claims that "Maryland courts apply the very same restrictive rules on third party standing articulated by this Court," and posits this as a reason why "this Court should not hesitate to apply its third party standing rules to this case" and reverse the judgment with instructions to remand for dismissal. Brief of Petitioner at 21. Her excursion into state law is not only plainly beside the point, but is also based on a highly dubious premise.

Since the Maryland Constitution "contains no express language limiting the judicial power to 'cases' or 'controversies,' " *Reyes v. Prince George's County*, 281 Md. 279, 290, 380 A.2d 12, 18 (1977), the courts of that state are "under no external edict to restrict [their] activity" to matters that would be deemed justiciable in the federal courts. C. Brown, *Introduction to Maryland Civil Litigation* § 1.51, at 42 (1982) [hereinafter cited as *Maryland Civil Litigation*]. In sharp contrast to federal practice, insofar as the Maryland Court of Appeals is concerned "there is no constitutional bar to our rendering an 'advisory opinion' " to dispose of, for example, "cases in which, because the action is moot or collusive, there is no actual controversy between the parties to the court." *Reyes*, 281 Md. at 298-99, 380 A.2d at 23.

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Court of Appeals " 'felt compelled by what it understood to be federal constitutional considerations' to apply the standing rules the way it did." Brief of Petitioner at 21. The cases in which this Court has relied upon the fact that a state court acted under such constitutional compulsion as a basis for reviewing the merits of a judgment, *e.g.*, *South Dakota v. Neville*, 103 S. Ct. 916, 919 n.5 (1983); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977), have involved state courts' upholding of asserted *substantive* rights, not their decision to accord standing to raise those rights. It could not be otherwise, since, as has been noted, this Court is precluded from assuming jurisdiction of the merits of a case unless it first independently satisfies itself of the existence of standing.[8]

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Thus where, as here, a party "elect[s] to raise . . . federal constitutional questions in a state court," if he has "standing under the law of Maryland to bring the suit, it is irrelevant that the result might have been different had the action been instituted in a federal court." *Murray v. Comptroller of the Treasury*, 241 Md. 383, 392, 216 A.2d 897, 902, *cert. denied sub nom. Cree v. Goldstein*, 385 U.S. 816 (1966). Even in situations in which the Maryland Court of Appeals may appear implicitly to import into state law federal standing doctrine, the court, exhibiting an entirely permissible "reluctance to refrain from exercising judicial power," *Maryland Civil Litigation* § 1.51, at 43, may express doubts as to the presence of standing but go on to decide the merits anyway. *E.g.*, *Clark v. State*, 284 Md. 260, 265-66, 396 A.2d 243, 247, *cert. denied sub nom. Stutzman v. Maryland*, 444 U.S. 858 (1979). *See also Kinsley v. Governor of Md.*, 289 Md. 620, 632, 426 A.2d 908, 915 (1981) (merits decided in moot case).

[8] A different situation is of course presented when a state court's *refusal* to find standing results in its failing to afford a remedy for an alleged violation of a federal right. *See, e.g., Allied Stores v. Bowers*, 358 U.S. 522, 525-26 (1959).

Doremus and *Princeton* came to this Court by way of appeal, and in both cases the appeals were dismissed. *Doremus*, 342 U.S. at 435; *Princeton*, 455 U.S. at 103. In light of the admonition of *Doremus* that the Court simply "cannot accept as the basis for review" a case that does not meet the requisites of federal standing, 342 U.S. at 434, the analogous course in a certiorari case would be to dismiss the writ as improvidently granted. *Cf. Cheaney v. Indiana*, 410 U.S. 991 (1973) (mem.) (certiorari denied "for want of standing," citing *Doremus*). *See generally Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (certiorari dismissed as improvidently granted where "no federal question of substance" was presented); *Benz v. New York State Thruway Authority*, 369 U.S. 147, 147 (1962) (per curiam) (same).

II.

In View Of Its Construction Of Section 103D, The Maryland Court Of Appeals Was Correct In Holding That The Section Is Overbroad, And That It Violates The Expressive Rights Of Advocacy And Public Information Organizations; Alternative Regulations Far Less Intrusive Of First Amendment Rights Would Better Accomplish State Objectives.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court struck down as overbroad a municipal regulation imposing a twenty-five percent limit on the application of funds raised for charitable purposes to expenses. Nevertheless, the Secretary argues that Maryland's twenty-five percent ceiling on the application of funds raised for charitable

purposes to non-charitable expenses, Md. Ann. Code art. 41, § 103D (1982), is not overbroad, for three reasons. First, because section 103D does not require that solicitors be licensed, and adherence to the twenty-five percent limit is therefore not a condition to receiving a license, it is said that section 103D is not a prior restraint and may not, consequently, be examined under the overbreadth doctrine. Second, the Secretary argues that the burden imposed by section 103D is far less substantial than that created by the Schaumburg ordinance, both because the calculation of the twenty-five percent limitation is based on different factors and because the limit may be waived under certain circumstances. Third, the Secretary asserts that the percentage limitation furthers significant state interests in a manner sufficiently precise to satisfy first amendment requirements.

While Maryland's limitation is, in some respects, a variation on the *Schaumburg* model, its differences hardly make up for the constitutional shortcomings found in *Schaumburg*. The Secretary's attempt to elevate the differences to the constitutional plane depends more on the dogged repetition of words like "moderate," "flexible," and "reasonable" than it does on analysis of the operation and effects of the statute.

There is no real disagreement between the parties about the standards for evaluating overbreadth once it is determined that the doctrine should be applied. Both recognize that, when a governmental entity imposes a "direct and substantial limitation on protected activity . . . [it] cannot be sustained unless it serves a sufficiently strong, subordinating interest" that the state is "entitled to protect." *Schaumburg*, 444 U.S. at 636. Moreover, the regulations are valid only if they are "narrowly drawn" and "designed to serve [state] interests without unnecessarily interfering with First Amendment freedoms." *Id.* at 637. In this

realm, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

It is in her proposed application of these well known principles that the Secretary errs. First, there is no basis for her attempt to distinguish *Schaumburg* on the ground that "the Schaumburg ordinance required every charitable organization soliciting funds door-to-door to apply for a permit 'prior to such solicitation' [,444 U.S. at 623, while] the Maryland statute requires no permit . . . ." Brief of Petitioner at 29. The Secretary is simply incorrect in suggesting that the permit requirement played any part in the Court's decision in *Schaumburg*; nor did the permit requirement lead the Court to view the case as involving a prior restraint.[9] It was the imposition of the overly broad condition rather than the timing of its application that invoked the overbreadth doctrine. Most overbreadth cases involve after-the-fact enforcement of laws limiting speech, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Button; Thornhill v. Alabama*, 310 U.S. 88 (1940), and the Court has never drawn a distinction for purposes of overbreadth analysis based on when a condition is enforced in relation to the speech.

The Secretary's confusion about the relationship between the overbreadth and prior restraint doctrines carries over to her discussion of the extent to which the Maryland statute imposes a "direct and substantial

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[9]The Secretary places considerable emphasis on the portion of the Schaumburg ordinance that required a license to be denied to a person "not of good character and reputation." 444 U.S. at 622. However, like the requirement that a license be obtained prior to solicitation, the character and reputation provision was quoted by the Court only as descriptive of the Schaumburg ordinance. Whatever may be the validity of such a provision, its presence was not at issue in *Schaumburg*, and it assumed no significance in the decision in the case.

limitation on protected activity." *Schaumburg*, 444 U.S. at 636. Whether or not a solicitation law requires a permit in advance is irrelevant to the directness or substantiality of the burden on protected activity. Instead, the proper question is whether the law precludes certain organizations from engaging in protected expression, or whether it infringes on the rights of non-profit organizations to decide for themselves the manner in which they wish to conduct fundraising and advocacy. 444 U.S. at 636-37.

In *Schaumburg*, the Court identified a class of organizations that would be severely circumscribed in their expressive activity by a percentage limitation on fundraising costs, those "that are primarily engaged in research, advocacy or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." Despite the assertions of the Secretary to the contrary, section 103D substantially affects precisely the same class of organizations as did the ordinance in *Schaumburg*.

In fact, the Secretary passes quickly by any argument that such organizations are protected under section 103D as it has been construed by the Maryland Court of Appeals. Instead, she claims that a number of administratively-created exemptions diminish the impact of section 103D enough to take it beyond the reach of the overbreadth doctrine. The exemptions, which the Secretary describes perhaps too often as reasonable and flexible,[10]

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[10] *Schaumburg* distinguished the ordinance in *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), on the ground that the Fort Worth ordinance allowed an organization exceeding a percentage limit on fund-raising costs "to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable." *Schaumburg*, 444 U.S. at 635 n. 9. The Secretary inaptly tries to transform the distinction in footnote 9 into

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still do not obviously protect the organizations described in *Schaumburg*, and, because they vest excessive discretion in the Secretary of State, pose a set of constitutional problems of their own. *See infra* pp. 18-22. In any event, the administrative regulations may not be viewed as affecting the constitutionality of section 103D because the Maryland Court of Appeals has already determined that the Secretary of State, in promulgating regulations for permits waiving the 25 percent expense limitation, "is confined to 'those instances where the 25% limitation would effectively prevent the charitable organi-

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an outright approval of *National Foundation*. Moreover, *National Foundation* rests upon a fundamentally flawed premise that "[n]o constitutional right exists to make a public solicitation of funds for charity," 415 F.2d at 45, a statement directly contrary to *Schaumburg*. 444 U.S. at 633. Based upon that premise, *National Foundation* used an inappropriate standard for examining the constitutionality of the Fort Worth ordinance, holding that the plaintiff had the "burden of establishing that the ordinance did not rest on any reasonable basis" and that a strong presumption of constitutionality should be accorded the ordinance. 415 F.2d at 45. The most that may be said about footnote 9 in *Schaumburg* is that the *National Foundation* limitation might be salvable from overbreadth; but to include an undefined exemption from the percentage limitation would be simply to trade overbreadth for vagueness. *See Aptheker v. Secretary of State*, 370 U.S. 500, 515-17 (1964).

Even more questionable is the Secretary's reliance on *Larson v. Valente*, 102 S. Ct. 1673 (1982). *See* Brief of Petitioner at 26, 31. The only issue in *Larson* was the validity under the establishment clause of a selective exemption of only some churches from the requirements of the Minnesota Charitable Solicitations Act. No other provisions of the Act were briefed or considered by the Court, and its passing reference to even-handed regulation of charitable solicitation may hardly be taken as a blanket endorsement of every detailed provision of the Minnesota Act.

zation from raising contributions.' " Petition for Writ of Certiorari and Appendix at 21a.[11]

Organizations engaged in public advocacy might, in theory, segregate fund-raising activities from public information activities, and employ low-cost methods of fundraising. They would, however, not be permitted under section 103D to continue to function as they have in the past, using paid solicitors who combine "the solicitation of financial support with the 'functions of information dissemination, discussion and advocacy of public issues.' " *Schaumburg*, 444 U.S. at 635. There is no sufficient reason for the state to intervene so drastically in the internal affairs of organizations engaging in protected expression. Not only would the division of functions apparently mandated by section 103D require hiring more individuals and expending more money, first to canvass by mail, telephone, or in person for fund-raising purposes, and then for the charitable purpose of disseminating public information, but it would interfere with a fundamental aspect of the communications between advocacy groups and the public. The request for funds should coincide

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[11] The limitation set forth in the Code of Maryland Regulations must be identical in impact to that of § 103D, and permits an exception to the 25% percent limitation if "necessary to the accomplishment of the organization's charitable purpose and [if] . . . there is no other reasonable alternative." Md. Admin. Code tit. 01, § 02.04.05(B)(1) (1982). The code also provides, by way of example, two situations in which a waiver would be appropriate and which therefore illustrate that § 103D and the accompanying regulations are not intended to protect, and are not capable of protecting, groups of the kind described in *Schaumburg*. *Id.* § 02.04.05(B)(2)(a) allows an exemption in the face of "extraordinary, unusual and non-recurring circumstances," and *id.* § 02.04.05(B)(2)(b) permits costs in excess of 25% when "an organization is less than 2 fiscal years old and in the development stage." Thus it is clear that established organizations consistently engaged in advocacy activities are not contemplated to qualify for an exemption.

with the public information aspect of the organization's work not only because the ideas expressed may provide the impetus for the contribution, therefore increasing the amount of funds raised, but because the contribution itself is an expression of support of and commitment to the views expressed.[12] Moreover, each organization should be as free as possible, consistent with protection of legitimate and substantial state interests, to choose its own form of organization and methods of fundraising. While well-known and non-controversial groups with large numbers of readily available volunteers, such as the Girl Scouts, might naturally operate within the limitations established by section 103D, groups without a large volunteer base or without a well established reputation would find it impractical to do so.

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[12]The practical relationship between the amount of donations received and the ability to engage in advocacy was well expressed in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19. Indeed, the Court emphasized that a contribution itself "serves as a general expression of support for a candidate and his views." *Id.* at 21.

Nor is section 103D narrowly tailored to legitimate state objectives. Much like the Village of Schaumburg, the Secretary claims that section 103D is necessary to prevent fraud or to ensure that charities are encouraged to expend funds for what the state deems appropriate purposes.[13] The simple answer is that the less restrictive alternatives suggested by the Court in *Schaumburg*—public disclosure of finances of charitable organizations and criminal prosecution of actual fraud—are far better suited to the accomplishment of these state objectives and to the furtherance of the public interest. For organizations engaged in outright fraud, superficial compliance with a percentage limit on fundraising costs would appear to pose no more of a problem than the more fundamental misrepresentation about the ultimate destination of the funds raised. To the extent the state's concern is with inefficient fund-raising practices or wasteful administration of the charitable organization itself, the answer seems to lie in the disclosure provisions discussed in *Schaumburg*, 444 U.S. at 638 & n.12, which permit prospective donors to decide for themselves whether the funds they give will be used to the extent they wish for the cause they support.

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[13] The few scientific studies of charitable contribution patterns and fundraising practices have failed to disclose any relationship between percentage limitations on fundraising costs and the percentage of funds raised use to pay such costs, much less any relationship between such percentage limitations and fraud. *See, e.g.*, Boyle & Jacobs, *Fund Raising Costs*, Philanthropy Monthly, Apr. 1979, at 5.

III.

The Standard For Granting Or Denying Waivers From The 25% Limitation Contravenes The First Amendment.

Apart from the Secretary's fallacious contention that the exemption lops off the overbreadth that was fatal to the Schaumburg ordinance, the provision creates a first amendment pitfall of its own by granting excessive discretion to a state official. This problem was recognized by the Maryland Court of Appeals. Petition for Writ of Certiorari and Appendix at 20a. The court was plainly correct. The first amendment requires that a permit system that purports to license the exercise of freedom of expression in a public forum[14] must contain "narrow, objective, and definite standards to guide the licensing authority" in order to be constitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). "The

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[14]Expression in a special environment such as a military base which is outside the "public forum" is governed by quite different standards. *See, e.g., Brown v. Glines*, 444 U.S. 348, 356-58 (1980). Since, however, the statute at issue governs expression regardless of its location, it clearly regulates speech within the public forum. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943) (house-to-house canvassing); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.) (expression in public streets and parks). For this purpose even expression on private property is speech within the "public" forum protected as against state action inasmuch as the state is not seeking to protect the privacy or property of the owner, the only special governmental interests stemming from expression on private property. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (general first amendment standards applied to speech at private farm). But even if different rules were applicable to expression on private property, the statute could still be attacked "on its face [because it] regulates the use of both public and private property." *Dulvaney v. Municipal Court (People)*, 11 Cal. 3d 77, 87, 520 P.2d 1, 8, 112 Cal. Rptr. 777, 784 (1974).

reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, (1975).[15]

One of the central purposes of the first amendment was to free expression from "the power of the licensor"; unless a law narrowly bounds that power, it "restore[s] the system of license and censorship in its baldest form." *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Therefore, "[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited . . . to consideration of public safety and the like." *Niemotko v. Maryland*, 340 U.S. 263, 282 (1951) (Frankfurter, J., concurring).

Repeatedly, therefore, laws or systems requiring permission for activity protected by the first amendment have been held to be facially unconstitutional if the permission does not issue "as a matter of course" and if its issuance or denial requires "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Cantwell v. Connecticut*, 312 U.S. 296, 305 (1940).[16]

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[15] In addition, "[a]ntipathy to the mere existence of censorial power must play some role." *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 823 n.10 (5th Cir. 1979) (Goldberg, J.).

[16] These principles are illustrated by this Court's most recent decision holding a regulation requiring official permission to engage in communicative activity to be unduly discretionary, *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). There an ordinance which required a solicitor to " 'notify the Police Department, in writing, for identification only,' " *id.* at 621, was held to "give [the] police the *effective* power to grant or deny permission" to control the expression of ideas and thus to suffer "in its practical effect from the vice condemned" in the cases discussed herein, *id.* at 622 (emphasis in the original), because it failed to state "what must be set forth in the notice or what the police will consider sufficient as "identification." *Id.* at 621. If such familiar terms as "notice" and "identification" do not pass muster as standards, then the range of permissible discretion is indeed narrow to the point of invisibility.

The system employed by Maryland to issue or to deny exemption from the 25% limitation sadly lacks the "[p]recision of regulation" that "must be the touchstone" when first amendment rights are involved. *See NAACP v. Button*, 371 U.S. 416, 438 (1963). Indeed, the power exercised here by the Secretary of State requires a high degree of judgment and therefore creates a grave, and unacceptable, risk of censorship.

The statutory provision simply directs the Secretary to "issue rules and regulations to permit a charitable organization" to exceed the percentage limitation if it "would effectively prevent the charitable organization from raising contributions." Md. Ann. Code art. 41, § 103D (1982). The rules do not content themselves with stating circumstances under which the limitation may be exceeded, however. In each instance in which an organization "expects to exceed or does exceed the 25-percent limitation," it must "file a request for a waiver . . . *before* further engaging in solicitation." Md. Admin. Code tit. 01, § 02.04.05(B)(3) (1982) (emphasis added). Thus, despite the Secretary's protestations, Brief of Petitioner at 29-30, a system closely resembling those found wanting in such cases as *Cantwell* and *Schneider v. State*, 308 U.S. 147, 164 (1939), both of which involved regulations of solicitation, is employed.

A waiver request will be granted "upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." Md. Admin. Code tit. 01, § 02.04.05(B)(1) (1982). Both portions of the standard require judgmental determinations that are anything but guided by narrow, objective, and definite standards. The Secretary's repeated characterization of the standard as "*flexible*," *e.g.*, Brief

of Petitioner at 31 (emphasis in the original), only serves to emphasize the problem.[17]

What is "necessary" is in the eye of the beholder. A zealous charitable administrator might believe that raising every dollar possible, no matater what the cost, is necessary to the accomplishment of his organization's purpose. On the other hand, an equally zealous official might well believe that a waiver of the limitation is necessary in that sense only if the organization would otherwise become bankrupt forthwith. Between these extremes, what might be necessity to one administrator might be mere convenience to the next.[18]

Likewise, "that there is no other reasonable alternative" is a matter hardly free from doubt. Is abjuring the use of professional fundraisers in favor of member-conducted campaigns an alternative? What if the organization is the Paralyzed Veterans of America, whose members are necessarily confined to wheelchairs?[19] What makes an alternative "reasonable"?

These determinations are no more exact or guided than those the Court has previously condemned. Determining, for instance, what is necessary to the accomplishment of a particular purpose is no more easily done than determining

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[17]This is particularly apparent if the Secretary's contention that "the regulations provide no limit on the circumstances justifying waiver," *id.* at 33, can be taken seriously as a matter of state law in the face of the court of appeals' construction of the statute. *See* Petition for Writ of Certiorari and Appendix at 20a.

[18]*Cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) ("The word 'necessary' . . . has not a fixed character peculiar to itself. It admits of all degrees of comparison . . . . A thing may be necessary, very necessary, absolutely or indispensably necessary.").

[19]*See* 36 U.S.C. § 1147 (1976).

whether a cause is "a religious one." *See Cantwell*, 310 U.S. at 305. Determining that there is no other reasonable alternative is no easier than determining an applicant's "good character." *Schneider*, 308 U.S. at 165. And neither determination is nearly so simple as determining whether there has been "notice" or "identification" by a solicitor. *Hynes v. Mayor or Oradell*, 425 U.S. 610, 622 (1976).[20]

Thus, the waiver system employed to allow exemptions from the percentage limitation is rife with discretion. Consequently, the system is "invalid on its face." *Lovell*, 303 U.S. at 451.

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[20]If anything, the exemption provision in the ordinance at issue in *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert., denied*, 396 U.S. 1040 (1977), is even more obvious discretionary, and hence more clearly invalid on this ground, than that involved here. The explicitly open-ended requirement of "special facts and circumstances . . . showing that a cost higher than twenty percent is not unreasonable," *id.* at 46, leaves the matter wholly in the hands of the government.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or, in the alternative, the judgment of the Maryland Court of Appeals should be affirmed.

April 25, 1983

Respectfully submitted,

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